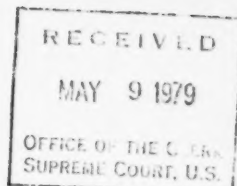


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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

NO. 78-6386

WILLIAM JAMES RUMMEL,
Petitioner

V.

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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* * *

On Petition For Writ Of Certiorari
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For The Fifth Circuit

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Attorney General of Texas, on behalf of W. J. Estelle, Jr., respectfully requests that the Court deny the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals affirming the judgment of conviction on direct appeal is Rummel v. State, 509 S.W.2d 630 (Tex.Crim.App. 1974) and is reproduced in Petitioner's Appendix to the petition for writ of certiorari at 49a. The unpublished opinion of the state convicting court denying the state application for writ of habeas corpus was entered on July 25, 1975, and is reproduced in Petitioner's Appendix at 45a. The unpublished order of the Texas Court of Criminal Appeals denying the state petition for writ of habeas corpus on the findings of the trial court was entered on September 23, 1975, and is reproduced in Appendix at 44a.

The unpublished opinion of the United States District Court for the Western District of Texas, San Antonio Division, denying Petitioner's federal application for writ of habeas corpus was entered on May 14, 1976, and is reproduced in Appendix at 39a. The panel opinion of the United States Court of Appeals for the Fifth Circuit reversing the denial of habeas corpus relief is Rummel v. Estelle, 568 F.2d 1193 (5th Cir. 1978). The en banc opinion of the Fifth Circuit--the opinion that Petitioner would have the Court review--affirming the district court's denial of habeas corpus relief on the Eighth Amendment issue and remanding the Sixth Amendment issue to the panel for its original consideration is Rummel v. Estelle, 587 F.2d 651 (5th Cir. 1978). Finally, the Fifth Circuit panel opinion on the Sixth Amendment issue that is not raised in the petition for writ of certiorari is Rummel v. Estelle, 590 F.2d 103 (5th Cir. 1979).

JURISDICTION

Petitioner's assertion is correct that the Court under 28 U.S.C. §1254(1) has jurisdiction over the judgment entered by the en banc United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED

The following questions are presented for review:

- A. WHETHER PETITIONER HAS PROCEDURALLY DEFAULTED ANY RIGHT TO CHALLENGE HIS PUNISHMENT AS CRUEL AND UNUSUAL BY FAILING TO OBJECT TO ENHANCEMENT UPON THAT OR ANY OTHER BASIS AT HIS TRIAL?
- B. WHETHER PETITIONER'S SENTENCE OF LIFE IMPRISONMENT IS CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT?
- C. WHETHER THE PROSECUTOR VALIDLY EXERCISED HIS DISCRETION TO SEEK A SENTENCE OF LIFE IMPRISONMENT FOR PETITIONER, WHO THE RECORD REFLECTS IS A HABITUAL CRIMINAL TOTALLY INCAPABLE OF FORMING HIS CONDUCT TO THE NORMS OF CIVILIZED SOCIETY?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner cites the Eighth Amendment; Art. 63, V.A.P.C. (1925); Art. 12.42(d), V.T.C.A. Penal Code (1974); and various other state statutes, all of which he sets out in Appendix at 56a. Respondent relies upon the Texas parole and good time credit statutes, Art. 42.12, §15(a), V.A.C.C.P., and Art. 6181-1, §3, V.A.C.S., respectively:

[T]he Board is hereby authorized to release on parole, with the approval of the Governor, any person confined in any penal or correctional institution of this State, except persons under sentence of death, who has served one-third of the maximum sentence imposed, provided that in any case he may be paroled after serving 20 calendar years. Time served on the sentence imposed shall be the total calendar time served and all credits allowed under the laws governing the operation of the Department of Corrections, and executive clemency. All paroles shall issue upon order of the Board, duly adopted and approved by the Governor.

Art. 42.12, §15, V.A.C.C.P.

(a) Inmates shall accrue good conduct time based upon their classification as follows:

(1) 20 days for each 30 days actually served while the inmate is classified as a Class I inmate;

(2) 10 days for each 30 days actually served while the inmate is classified as a Class II inmate; and

(3) 10 additional days for each 30 days actually served if the inmate is a trusty.

(b) No good conduct time shall accrue during any period the inmate is classified as a Class III inmate or is on parole or under mandatory supervision.

Art. 6181-1, §3, V.A.C.S.

Respondent additionally by reference relies upon the good time and parole statutes of all other American criminal jurisdictions, as well as, if necessary, those of any "other western nation." (See petition for writ of certiorari at 13.)

STATEMENT OF THE CASE

The relevant facts are adequately set forth in the panel opinion, Rummel v. Estelle, 568 F.2d 1193, 1195 (5th Cir. 1978), as quoted in the en banc opinion, Rummel v. Estelle, 587 F.2d 651, 653 (1978):

In January 1973, a Texas grand jury indicted Rummel for the felony offense of obtaining \$120.75 under false pretenses. The indictment also charged him with having two prior felony convictions: in 1964 he presented a credit card with the intent to defraud of approximately \$80, and in 1969 he passed a forged instrument with a face value of \$28.36. Rummel pled not guilty to the false pretense indictment, but a jury found him guilty as charged. After the state proved his two prior convictions, Rummel received an enhanced sentence of life imprisonment under the Texas habitual criminal statute then applicable, Tex. Penal Code Ann. art. 63 (Vernon 1925). On appeal, the Texas Court of Criminal Appeals affirmed his conviction. Rummel v. State, 509 S.W.2d 630 (Tex. Cr. App. 1974). Rummel applied for postconviction relief and raised in the Texas courts the issues now before us, but his application was denied without a hearing. Then Rummel sought habeas corpus relief in the federal district court, which also denied his petition without a hearing. (footnote omitted)

REASONS FOR DENYING THE WRIT

I.

THE OPINION BELOW DOES NOT SERIOUSLY
CONFLICT WITH THAT OF ANOTHER CIRCUIT
COURT OF APPEALS.

The petition avers that the opinion below directly conflicts with that of the United States Court of Appeals in Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973), cert. denied, 415 U.S. 938 (1974). No serious conflict is shown. Hart embraced the concept of proportionality in sentencing and established a four-prong test for determining whether a particular punishment is so grossly disproportionate to the severity of the underlying offense as to constitute cruel and unusual punishment proscribed by the Eighth Amendment. That test focuses upon (1) the nature of the offense; (2) the legislative purpose of the statute and whether a significantly less severe penalty might accomplish that purpose; (3) the punishment that the defendant might have received in other jurisdictions for the same offense; and (4) the punishments proscribed in the same jurisdiction for other offenses.

The en banc opinion in Rummel likewise agreed that some criminal sentences can be so disproportionate as to amount to cruel and unusual punishment. Rummel at 655. The Court then adopted wholly the first, third, and fourth portions of the Hart test. The Court rejected the second prong in recognition of the impossible burden it imposes upon the state and because a majority of this Court had never adopted it, even in death penalty cases. Id. at 661.

The Fifth Circuit next substituted the traditional rational basis test for justifying a state punishment scheme. In essence, this substitution merely shifts the burden of proof for one of the four elements of a test for the application of the proportionality in sentencing concept that both the Fourth and Fifth Circuits have adopted.

This difference simply poses no serious conflict between the Circuits justifying plenary consideration or corrective action by the Court. Any difference in the results of cases is far more likely to be correctly explained in terms of differing fact situations than any minor difference in the applicable legal tests. This conclusion is greatly strengthened by examination of Hart's progeny in the Fourth Circuit, Davis v. Davis, 585 F.2d 1226 (4th Cir. 1978); United States v. Williamson, 567 F.2d 610 (4th Cir. 1977); Hall v. McKenzie, 537 F.2d 1232 (4th Cir. 1976); Hall v. Bostic, 529 F.2d 990 (4th Cir. 1975), cert. denied, ___ U.S. ___, 96 S.Ct. 1733 (1976); Griffin v. Warden, 517 F.2d 756 (4th Cir. 1975); and Wood v. South Carolina, 483 F.2d 149 (4th Cir. 1973). These cases show a consistent refusal to apply Hart in a variety of contexts. Cf. Roberts v. Collins, 544 F.2d 168 (4th Cir. 1976).

In spite of Petitioner's protestations as to the importance of the question (Petition at 16-18), the outcome of the cases in the Fifth and Fourth Circuits has been remarkably similar. Petitioner has shown no fundamental difference in the approaches of these courts.

THE OPINION BELOW CORRECTLY IM-
PLEMENTS PRIOR AUTHORITIES EMANA-
TING FROM THIS COURT.

The Court has never invalidated a sentence in a criminal case solely because of its length. Petitioner argued in the court below that dicta in several cases had suggested, however, that this Court might do so in a proper case. E.g., Coker v. Georgia, 433 U.S. 584 (1977); Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349 (1909); O'Neil v. Vermont, 144 U.S. 323 (1892) (dissenting opinion of Fields, J.). The Rummel court clearly admitted that it was bound by these dicta and the implications of the holdings, which it construed as establishing the principle of proportionality in sentencing. In spite of all this, Petitioner alleges that the Rummel court's opinion, "while conceding the validity in theory of both the excessiveness principle and the Coker test, see 587 F.2d at 655, emasculates the principal [sic] by applying the test improperly in practice." (Petition at 7.)

Respondent denies that the court below improperly applied the test, as discussed in Part IV(B) below. Equally important, however, even if it did, no substantial reason for granting the petition is shown. This Court does not sit as a super appeals court to review every alleged improper application of concededly correct legal principles to particular fact situations.

III.

THIS COURT IS PRESENTED WITH NO
COMPELLING REASON TO RECONSIDER
ITS VERY RECENT REFUSAL TO REVIEW
THE IDENTICAL ISSUE PETITIONER
SEEKS TO RAISE.

In Carmona v. Ward, ___ U.S. ___, 99 S.Ct. 874 (1979), the Court refused to grant a petition for writ of certiorari to consider "whether two mandatory life sentences imposed under [N.Y. Penal Law §§77.00-2(a), 77.00-3(a) (McKinney)], one for possession of an ounce of a substance containing

cocaine, and the other for sale of 0.00455 of an ounce of a substance containing cocaine, constitute cruel and unusual punishment." Id. at 875 (dissenting opinion of Marshall, J.).

The Second Circuit opinion that the Court refused to review, Carmona v. Ward, 576 F.2d 405 (2d Cir. 1978), is virtually identical in approach, language, and holding to the Fifth Circuit opinion in Rummel. The latter, in fact, relies heavily upon and quotes extensively from the former, especially insofar as the critical issue of the importance of state good time and parole laws is concerned.

In a lengthy and vigorous dissent to the denial of the petition for writ of certiorari in Carmona, Justices Marshall and Powell presented many of the arguments espoused by the Rummel dissenters in the court below and advanced by Petitioner herein. Only four months ago, these arguments failed to persuade the Court. There is simply no perceptible reason for reconsidering that conclusion now.

The only such reason suggested by Petitioner is that his case is better than Carmona's because it does not involve drug offenses, an area imbued with special social interests not present in his crimes, consisting of forgery, credit card abuse, and theft. In fact, special social interests are invoked by Petitioner's life sentence, which was automatically imposed upon his conviction because of his adjudication as a habitual offender under Texas law. Petitioner did not receive his life sentence, that is, merely because he committed three offenses totaling \$230.11 in booty, but because over a long period of time he exhibited a total inability to conform his conduct to the norms of civilized society.

Therefore, the special social interests in implementing his sentence are at least as important as those in upholding Carmona's. There is no significant reason for reaching a different result in Rummel's petition for writ of certiorari than in Carmona's.

THE DECISION BELOW WAS CORRECT.

For three reasons, the en banc court in Petitioner's case correctly denied relief.

A. Petitioner Procedurally Defaulted Any Right To Challenge His Punishment As Cruel And Unusual By Failing To Object To Enhancement Upon That Or Any Other Basis At Trial.

It is uncontested that Petitioner did not object to any aspect of the sentencing proceedings at his trial. He not only made no pre-trial motion to quash the enhancing allegations of his indictment, but plead "True" to them at the punishment stage of his bifurcated trial. He did not object to the introduction of the prior convictions. He did not object to the trial court's instructions to the jury, which compelled a sentence of life imprisonment if the jury found that Petitioner had been twice previously convicted of felonies, and he raised no Eighth Amendment issue in a motion for new trial.

It is further uncontested that Texas generally employs a "correct contemporaneous objection rule" for preservation of grounds of error that might have been raised at trial. 5 TEX.JUR.2d, Appeal & Error--Criminal Cases, §22 at 42-43, Sec. 35 at 56 (1959), and cases there cited; see St. John v. Estelle, 563 F.2d 168 (5th Cir. 1977) (en banc). For these reasons, Respondent urged in the court below that application of the procedural default doctrine of Wainwright v. Sykes, 433 U.S. 72 (1977), precludes consideration of Petitioner's Eighth Amendment claim.

The Rummel court rejected this argument for two reasons, both of which are erroneous. First, the Court held that the Texas Court of Criminal Appeals "has repeatedly rejected Rummel-like challenges to the Texas habitual criminal statute [footnote omitted]" and that Rummel should not have been required to "make a futile gesture at his trial." Rummel at 653. Apart from the fact that nothing in Sykes sanctions

a futility exception to the procedural default doctrine, Petitioner has always insisted that his case is a more compelling one than those previously presented. Certainly nothing in the Texas cases rejecting "Rummel-like challenges" precludes the possibility that the Texas Court of Criminal Appeals might in a proper case find a sentence cruel and unusual solely because of its length, any more than the several previous Fifth Circuit cases rejecting such challenges precluded a Fifth Circuit panel from finding for Rummel.

Second, the en banc Rummel court noted that Texas requires no contemporaneous trial objection by a criminal defendant to challenge later the constitutionality of the statute under which he was convicted. But Petitioner does not challenge the constitutionality of that statute; he recognizes that Spencer v. Texas, 385 U.S. 554 (1967), and many other cases would be adversely dispositive of any such contention. Instead, he contends the statute is unconstitutional as applied to him. Each such challenge obviously rests upon its own facts and is precisely the type of question best raised initially at the trial court and as to which the trial judge should make the initial determination. In short, valid state interests would be served by applying Wainwright v. Sykes to Petitioner's case. Because of this independent barrier to reviewing Petitioner's claim on the merits, the petition for writ of certiorari should be denied.

B. Petitioner's Sentence Of Life Imprisonment Is Not Cruel And Unusual Under The Eighth Amendment.

The majority in the court below rejected Respondent's argument that it was "without power under the eighth amendment to review any prison sentence within the legislatively created maximum," in spite of much conceded authority for

that position. Rummel at 654 & nn. 3,4. The majority concluded, therefore, that "if the court is forced to assume that Rummel's sentence is automatically and invariably one for his natural life," then it is probably grossly disproportionate. Id. at 659.

For that reason, the pivotal basis of decision--and the crux of the entire dispute in the court below--was the proper application of the Texas good time and parole laws. The record contains a detailed compendium of the good time credit provisions and their effect on parole at the time Petitioner was sentenced of all fifty-one American jurisdictions. A portion of that compendium was reproduced as an appendix to the opinion of the court below. Id. at 663-65.

Respondent thereby illustrated the workings of its good time law, Art. 6184-1, V.A.C.S., currently Art. 6181-1, V.A.C.S., which Respondent argues is the most liberal such statute in the United States. In conjunction with Art. 42.12, §15(a), V.A.C.C.P., the Texas parole statute, "[T]he inevitable conclusion is that Rummel can be eligible for parole at the end of twelve calendar years, or considering his trusty status, even earlier." Id. at 659. A comparison to the statutes of other jurisdictions reveals that Petitioner's actual time in prison would not be appreciably longer in Texas than in many other jurisdictions, assuming some modicum of decorous conduct while incarcerated.

Obviously, it is at this point that all of Petitioner's arguments collapse. The actual sentence is not grossly disproportionate to the nature of his many offenses and his adjudication as a habitual criminal. It is not disproportionate to the actual sentence he might have received in other jurisdictions.

The record contains additional evidence to show that Texas prisoners serving life sentences for offenses such as theft and forgery are paroled significantly sooner--approx-

mately five years sooner--than those serving life sentences for offenses such as rape and murder. Petitioner's argument that his punishment should not be extended by virtue of denial of parole for a "bad attitude" in prison (Petition at 9) mistakenly presumes that a clear conduct record while incarcerated is the only or even necessarily the most important factor in the parole decision process. Other factors enumerated in the 1978 Texas Board of Pardons and Paroles Handbook on Parole, Mandatory Supervision, and Executive Clemency, include the inmate's developmental and criminal history, intellectual and emotional status, age at the time of his first arrest, point incentive program ratings, and time served on the sentence. (Handbook at 23-25.) The record in the instant case reflects a rational coalescing of all such factors in the manner described and therefore demonstrates rationality in the Texas sentencing scheme.

Not surprisingly, Petitioner has vigorously opposed any consideration of these realities, for they are destructive of his position. Although to ignore them is self-imposed judicial myopia, Petitioner suggests incredibly that granting him parole would not significantly lighten his punishment because the threat of additional incarceration for violation of the conditions of parole is itself cruel and unusual. But as the Rummel majority stated, "We cannot understand how a lifetime requirement of good behavior is too much to ask of a habitual criminal." Rummel at 659 n. 19.

The approach espoused by Petitioner focuses in a manifestly unfair manner upon a very small portion of the entire Texas statutory scheme of punishment. That scheme admittedly imposes on Petitioner a sentence facially more severe than that possible in many other jurisdictions and possibly than in all of them. At the same time, however, the Texas statutes operate to reduce the length of the sentence much more than that possible in numerous other jurisdictions, and possibly more so than any of them.

It has never been thought that the Constitution would forbid such a scheme. Wholly apart from the almost impossible prosecutorial and judicial tasks of applying in practice the rule of law contended for by Petitioner, the concomitant "levelling" of all state statutes in such a way as to stifle any difference in approach to a difficult problem with no easy solution, crime in America, is both unwise and destructive of the proper ends of democratic society.

C. Petitioner Has No Basis For Attacking The Prosecutor's Valid Exercise Of Discretion In Indicting Him As A Habitual Offender.

Petitioner has correctly noted the mandatory nature of the life sentence he received after the prosecutor alleged and proved the requisite prior convictions. The Texas prosecutor is vested with much discretion in the charging process as in many other areas. A holding that Petitioner's sentence is constitutionally impermissible would necessitate holding that the prosecutor abused his discretion in the charging process.

Common sense dictates that a state prosecutor must assess a constellation of factors in setting priorities and goals in the types of crimes he desires to prosecute and the appropriate penalties he will seek under various circumstances. Respondent doubts that the Court believes that the lower federal courts should be in the business of overseeing the daily exercise of prosecutorial discretion in the absence of any suggestion of vindictive or otherwise improper motives.

Such a holding would be contrary to the prior teachings of the Court in such cases as Santobello v. New York, 404 U.S. 257 (1971), and Bordenkircher v. Hayes, 434 U.S. 357 (1978). Endowing federal district courts with the authority to strike down state criminal penalties as excessive on an ad hoc basis would, in light of the complexity of the Texas Penal Code, create a horde of obvious problems for both Texas prosecutors and the lower federal courts. For that

reason, Judge Thornberry, dissenting from the panel opinion in the court below, wrote "Whatever sociological analysis I might apply to this case, I cannot avoid the conclusion that with this decision we stand on the brink of the 'slippery slope' in its most classic sense". Rummel v. Estelle, supra, 568 F.2d at 1202.

If, however, Respondent is wrong on this point, then he suggests that at the very least he is entitled to demonstrate all factors bearing upon the original prosecutorial decision, particularly the full extent of Petitioner's entire criminal history. It would be more than a little unfair, in fact, to deprive Respondent of the opportunity to show Petitioner's other crimes to demonstrate the reasonableness of the prosecutor's decision to seek enhancement merely because Texas law does not require such other crimes to be alleged or proved at trial.

The court below noted, "The record in this case reveals that Rummel was convicted of a fourth felony on the same day he was sentenced under Texas habitual offender statute." Rummel at 659. The record also contains an appendix to an amicus brief filed by the district attorney in Bexar County, Texas, where Petitioner received his life sentence. That appendix contains certified copies of Petitioner's other judgments of conviction for numerous additional crimes over a fourteen-year period, including at least one felony involving the potential for violence (burglary), and two misdemeanors involving both the potential for violence (unlawfully carrying a deadly weapon) and violence itself (aggravated assault on a female).

Therefore, if the Court is dissatisfied that the record in its present state authorizes the punishment imposed, Respondent prays for a remand to the district court where he believes he is entitled to submit additional evidence in support of the valid exercise of prosecutorial discretion in Petitioner's case.

CONCLUSION

For these reasons, the petition for writ of certiorari
should be denied.

Respectfully submitted,

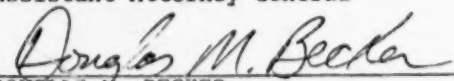
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